IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 6941 OF 2000

1. MRS. PERVIZ WD/O FARROK NOSHIRWAN KAKA, residing at Awabai Mansion, Hentry Road Colaba, MUMBAI 400 001

2. PORUS F.KAKA S/o FARROK KAKA

3. HOMI F.KAKA S/o FARROK KAKA

4. NOSHIRWAN S/o FAROK KAKA

   All residing at Avabai Mansion, Henry Road, Colaba Bombay 400 039.

5. BOMSI S/o FARROK KAKA mentally retarded through his mother Petitioner No. 1 .. PETITIONERS

Versus

1. MR. M. K. PATIL Administrator General & Official Trustee, Maharashtra State,

2. MR. SURENDRA ANATH BAGAI A Lodger residing in Bentley's Hotel, Oliver Road Off Waltan Road, Colaba, MUMBAI 400001.

3. MR. VISHWANATH ACHARYA 1st floor, Angelika Sadan 47, Sitladevi Temple Road, Mahim, Mumbai 400 016.

4. SMT. RASHMI R. THALLA residing at Nestile Hall, 22 Nesbit Road, Mazagaon, MUMBAI 400 010. .. RESPONDENTS

Mr. V. R. Dhond with Mr. Yigal Gabriel i/b Humranwala & Co. for the petitioners.

Mr. V.Y. Sanglikar - R-2.

Mr. R.V. Govilkar, R-1

CORAM:-SMT. RANJANA DESAI &

SMT. V.K. TAHILRAMANI, JJ.

DATED:-27/9/2006

ORAL JUDGMENT:-(Per Smt. Ranjana Desai, J.)

. The petitioners have prayed for a declaration that notice bearing No. AG/Misc./162/5 of 2000 dated 16/5/2000 and notice No. AGOT/Misc./1726/5 of 2000 dated 31/5/2000 are void, illegal and inoperative and are of no legal effect and that respondent 1 the Administrator General and Official Trustee, Maharashtra State is debarred from proceeding with any inquiry pursuant thereto. The petitioners have also prayed that the said notices be quashed.

2. The petitioners claim to be the only heirs and legal representatives of deceased Mr. Farrok N. Kaka. They claim to be tenants by virtue of Section 5(11)(c) of the Bombay Hotels & Lodging

House Rent (Control) Act, 1947, ("Rent Act" for short) in respect of the premises situated in the building known as 'Jer Manzil' at Oliver Road Colaba, Mumbai and also in respect of other premises situated in the building known as 'Naju Manor' and 'Sakina Mansion', situated at Oliver Road, Colaba, Mumbai wherein they are doing their business of running a hotel and lodging house under the name and style of "Bentleys' Hotel" after the death of Mr. Farrok N. Kaka on 2/6/88.

3. It appears that one M. N. Kaka was the tenant of the aforesaid premises and he was carrying on business therein of running a hotel and lodging house under the name and style of 'M/s. Bentleys Hotel'. He died on 21/2/86. He died issueless. It is the petitioner's case that his brother Farrok N. Kaka was his only heir and legal representative by virtue of Section 5(11)(c) of the Rent Act. According to the petitioners Farrok N. Kaka continued to be a protected tenant of the said premises. He continued to carry on the business of M.N. Kaka and he discharged liabilities and obligations of M. N. Kaka.

4. Admittedly respondent 2 filed a declaratory

suit being Suit No. 61 of 1987 against Farrok N. Kaka as heir and legal representative of deceased M.N. Kaka, claiming tenancy in respect of the rooms that he was occupying. Farok N. Kaka died on 12/6/88. Respondent 2 filed an application in declaratory suit filed by him praying that the petitioners be joined as defendants in place of deceased F.N. Kaka as his heirs and legal representatives.

5. On 11/6/99 respondent 2 filed an application stating that the petitioners did not represent the estate of the deceased tenant M.N. Kaka and were liable to be deleted from the suit and respondents 3 and 4 i.e. M. V. Acharya and Mrs. Rashmi Thalla in their capacity as executors of the will of the original tenant be brought on record.

6. Petitioner 3 filed a reply to the said application. On 17/2/2000 the said application was allowed. The names of the petitioners were deleted and Mr. M.V. Acharya and Mrs. Rashmi Thalla were brought on record. It appears that the petitioners have filed writ petition being Writ Petition No. 3178 of 2000 in this court being aggrieved by the said order. The said writ petition is pending.

7. Respondent 3 Mr. Acharya has also filed Writ Petition No. 27211 of 2000 challenging the said order. The said petition has been admitted. It is pending.

8. On 29/4/00 respondent 2 made an application to respondent 1 the Administrator General & Official Trustee, Maharashtra State, stating inter alia that M.N. Kaka had left a Will dated 24/8/82 which was registered with the Registrar of Documents at Serial No. BOM/2493/1/4, iii (Book No. iii)/1982 and that M. N. Kaka had created a trust of all his properties and the following persons were appointed as Trustees:

1. Farrok N. Kaka - Brother of Testator
2. Vishwanath Acharya-Colleague of Testator
3. Rashmi R. Thalla - Niece of Testator

A copy of the said Will was annexed to the application.

9. It was stated in the application that though the trust is created by will, one of the trustees is dead. One trustee is not available for

administering the trust and the third trustee claims not to be a trustee or executor. We may quote the relevant paragraph of the application:

> "It is submitted that this is a case where though a trust is created by Will, one of the trustees is dead, one is not available for administering the Trust and the third one has claimed not to be a trustee or executor. In such circumstances, it will be utmost fit, proper and in the interest of justice that the trust created by a Will be administered in accordance with the law and the Administrator General and Official Trustee in the said capacities should take over the charge, management and administration of the estate governed by the trust under the Will. The properties mentioned in the Will are in the danger of being vested and improperly alienated and at any rate persons who do not have any right whatsoever are claiming to administer the trust property."

In the application it is prayed that action be taken for administration of the trust property in

the manner best suitable and proper.

10. On 16/5/2000 respondent 1 issued notice to the petitioners. By that notice the petitioners were directed to attend the office of respondent 1 on the appointed date and time either personally or along with their legal representatives. The petitioners were also directed to give written submissions if any.

11. On 31/5/2000 another notice was issued by respondent 1 stating that on 24/5/2000, the petitioners had remained absent and hence the matter was adjourned to 9/6/2000. The petitioners were directed to attend the hearing. It was stated that if they do not attend the hearing it will be presumed that they have nothing to say in the matter and respondent 1 will have to move this court to take over the Trust/Estate property of deceased M. N. Kaka.

12. On 2nd November, 2000 respondent 2 filed reply to the said application. It appears that on 1/8/2000 Mr. Acharya addressed a letter to respondent 1 stating that the will of M.N. Kaka was not probated because M. N. Kaka had revoked

the will. It was further stated by Mr. Acharya that the said will was not acted upon.

13. On 6/12/2000 the petitioners filed the instant petition challenging notices issued by respondent 1 and praying that they may be quashed and set aside. On 13/12/2000 Rule was issued and interim relief in terms of prayer clauses (b) & (c) was granted. Consequently hearing of the application filed by the respondent 2 and the hearing of the impugned notices was stayed.

14. We have heard Mr. Dhond, the learned counsel appearing for the petitioners. He has taken us through the provisions of the Official Trustees Act 1913 ("the said Act for short). He particularly drew our attention to Sections 7, 8 and 9 of the said Act. He contended that under Section 7 of the said Act, the Official Trustee can be appointed by court of competent jurisdiction. Under Section 8 of the said Act the Official Trustee may with consent, be appointed trustee of settlement by grantor. Section 9 of the said Act provides for appointment of Official Trustee as Trustee by will. He submitted that the present case is not covered by any of the above Sections.

15. The learned counsel then took us to Section 10 of the said Act and contended that under Section 10 it is only this court which can appoint Official Trustee as trustee of a property, if the circumstances mentioned under Section 10 are present. The learned counsel urged that the Official Trustee cannot take upon himself the said function. He cannot assume jurisdiction on his own. The learned counsel then took us to Section 26 of the said Act. He pointed out that as per this section any order under the said Act may be made on the application of any person beneficially interested in any trust property or of any trustee thereof. The learned counsel contended that respondent 2 is not a person who is beneficially interested in the trust property and therefore, application made by him is not tenable at all. The learned counsel urged that it is only when a person who is beneficially interested in any trust property moves the court, the court will consider whether interest of trust requires appointment of Official Trustee and then with consent of the Official Trustee, he can be appointed. Such is not the case here.

16. The learned counsel further urged that there is no provision under the said Act which empowers the Official Trustee to issue notices to people before his appointment is made by the court. He cannot take upon himself judicial or quasi judicial functions of issuing notices prior to his appointment. The issuance of notices is, therefore, ex facie without jurisdiction. He submitted that it is totally a malafide exercise of power and that too at the instance of respondent 2 who is illegally occupying the said premises.

17. We have also heard Mr. Govilkar, the learned counsel appearing for respondent 1. He submitted that under Section 10 of the said Act Official Trustee can always make an application to a court of competent jurisdiction. Section 10 no where says that Official Trustee cannot make any application. The learned counsel further contended that if the party approaches the Official Trustee with an application indicating that the property is mismanaged it is Official Trustee’s duty to enquire into the matter and find out whether there is any truth in the application and for that purpose he can always issue notices. There is no provision in the said Act which puts fetters on the Official

Trustee and prevents him from issuing notices. Mr. Govilkar submitted that in any case after the inquiry is complete the Official Trustee has to come back to this Court as per Section 10 of the said Act. It is only if this court is satisfied that his appointment is necessary in the interest of the estate and the conditions mentioned in Section 10 are present that this court appoints him. Therefore, the ultimate control is of this court. It is this court which will supervise and control the actions of the Official Trustee. Mr. Govilkar contended that it is true that under Section 26 a person who is beneficially interested in the trust can make an application but in a given case in the interest of the estate, the Official Trustee can take resort to Section 10 of the said Act. Mr. Govilkar submitted that there is no error of jurisdiction. The Official Trustee has followed principles of natural justice by issuing notice and hence there is no case made out for quashing of the show cause notices.

18. We have also heard Mr. Sanglikar, the learned counsel appearing for respondent 2. Mr. Sanglikar submitted that the petitioners have challenged show cause notices. He submitted that no case is made

out for quashing of show cause notices. Relying on the judgments of the Supreme Court in **Special Director & Anr. v. Mohd. Ghulam Ghouse & Anr., AIR 2004 SC 1467** and **Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & Ors., AIR 1996 SC 691**, he submitted that unless this court is satisfied that the show cause notices are totally non est in the eyes of law for absolute want of jurisdiction, writ petition challenging the same should not be entertained.

19. Mr. Sanglikar submitted that respondent 2 is relying on a registered will, a copy of which is annexed to his application. The registered will surely cannot be ignored and, therefore, respondent 1 cannot be faulted for having issued show cause notices. He submitted that respondent 1 by issuing notices has followed principles of natural justice and such exercise cannot be faulted.

20. Mr. Sanglikar then drew our attention to Section 9 of the Administrator General Act 1963 and contended that if no person takes any proceedings for protection of a particular estate the Administrator General would be within his right to act under Section 9 of the Administrator General

Act, 1963 and, therefore, in the facts of this case, notices issued by the Administrator General are perfectly justified.

21. Mr. Sanglikar also drew our attention to Section 29 of the said Act and contended that under Section 29, the Official Trustee can transfer any property vested in him to any other person if the court so directs. He submitted that, therefore, since this court has the ultimate control over Official Trustee's actions, this court can pass appropriate orders either of confirming the appointment of the Official Trustee and/or directing that the property should be transferred to some other person. Mr. Sanglikar submitted that in any case this is not a case where hearing of the show cause notices should be stopped.

22. In our opinion, hearing of the impugned show causes notices cannot be stalled. In **Executive Engineer, Bihar State Housing Board's case (supra)** writ petition was filed challenging show cause notice issued to the petitioner therein by competent authority under the Bihar Housing Board's Act. Supreme Court observed that notice in question can not be said to be ex facie a "nullity"

or totally "without jurisdiction" in the traditional sense of that expression that is to say, that even the commencement or initiation of the proceedings, on the face of it and without anything more, is totally unauthorized. The Supreme Court observed that in such a case, for entertaining a writ petition under Article 226 of the Constitution of India against a show-cause notice, at that stage, it should be shown that the authority has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, observed the Supreme Court it is only appropriate that the party should avail of the alternate remedy and show cause against the same before the authority concerned and take up the objection regarding jurisdiction also, then. It was further observed that in the event of an adverse decision, it will certainly be open to him, to assail the same either in appeal or revision, as the case may be, or in appropriate cases, by invoking the jurisdiction under Article-226 of the Constitution of India.

23. In **Mohd. Ghulam Ghouse's case (supra)** this court had stayed the Show-Cause notice issued by Special Director, Enforcement Directorate, Ministry

of Finance, Government of India in respect of alleged financial irregularities and manipulation of accounts done by the petitioner therein. The Supreme Court did not approve this Court's order staying the show cause notice. The Supreme Court observed that the practice of the High Court entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process is deprecated by it in large number of cases. The Supreme Court made it clear that unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. The Supreme Court further made it clear that whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court.

24. We draw support from above authoritative pronouncements of the Supreme Court. In our considered opinion, this is not a case where hearing of the show cause notices could be stalled. It is contended that the show cause notices are non est because the Official Trustee had no jurisdiction to issue them. In the light of above judgments of the Supreme Court, we feel that even objections to the jurisdiction can be taken by the petitioner before the Official Trustee. In fact, it appears that such an objection has already been raised in the reply filed by the second petitioner before Official Trustee. If no such contention is raised it is always open to the petitioner to raise it by filing additional reply. In the peculiar facts and circumstances of the case when copy of the alleged will is annexed to the application, we see no reason to quash the show cause notices. If the petitioners make out the case that the Official Trustee had no jurisdiction, it is possible that the Official Trustee may discharge the notices and in any case as discussed by us hereinabove, under the provisions of the said Act, this court controls and supervises the action of the Official Trustee and therefore, mistake if any committed by the

Official Trustee can always be rectified by this court after hearing the petitioners at the appropriate time. We, therefore, feel that the interim stay granted by this court must be vacated and the Official Trustee must be directed to proceed with the hearing of the show cause notices and dispose them of within a time frame laid down by this court. Hence the following order:

1. The Administrator General & Official Trustee, the respondent 1 herein, shall proceed with the enquiry in Case No. 5 of 2000 for which he has issued show cause notice No.AG/Misc/1625 of 2000 to the petitioner. The petitioners and the respondents shall be entitled to file their say / affidavits and the enquiry shall be complete in accordance with law after giving an opportunity of hearing to the petitioners and the respondents.

2. Respondent 1 is directed to complete the enquiry and submit his report and seek appropriate directions from this court as expeditiously as possible and in any event within six months from the date

of order on this petition being filed before him. The petitioners and the respondents to extend the necessary co-operation to the respondent 1 for early disposal of the enquiry.

3. Parties shall appear before the Administrator General and Official Trustee, Maharashtra State within four weeks. The Administrator General and Official Trustee shall give sufficient notice to the respondents before submitting any report to this court.

4. All rights and contentions of both sides, including the question of jurisdiction are kept open.

5. This court has not expressed any opinion on the merits of the case.

6. Writ petition is disposed of in the aforestated terms. Interim stay vacated.

(SMT. RANJANA DESAI,J.)

(SMT.) V.K. TAHILRAMANI, J.)